

**U.S. Department of Labor**

Benefits Review Board  
200 Constitution Ave. NW  
Washington, DC 20210-0001



BRB No. 18-0512

RANDOLPH BESSARD

Claimant-Respondent

TONY B. JOBE

(Former attorney for claimant)

Petitioner

v.

C & D PRODUCTION SPECIALIST  
COMPANY, INCORPORATED

and

LOUISIANA WORKERS'  
COMPENSATION CORPORATION

Employer/Carrier

DATE ISSUED: 03/13/2019

DECISION and ORDER

Appeal of the Supplemental Decision and Order Denying Attorney's Fees and the Supplemental Decision and Order Denying Counsel's Motion for Reconsideration of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Tony B. Jobe (Law Offices of Tony B. Jobe), Madisonville, Louisiana.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant's former counsel, Tony B. Jobe, appeals the Supplemental Decision and Order Denying Attorney's Fees and the Supplemental Decision and Order Denying Counsel's Motion for Reconsideration (2012-LHC-1984) of Administrative Law Judge Lee J. Romero, Jr., rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). The amount of an attorney's fee award is discretionary and will not be set aside unless it is shown by the challenging party to be arbitrary, capricious, based on an abuse of discretion or not in accordance with law. *See Conoco, Inc. v. Director, OWCP*, 194 F.3d 684 33 BRBS 187 (CRT) (5th Cir. 1999).

This case has a long procedural history. We restate only the relevant facts. Claimant sustained a work-related injury on November 21, 1997, and retained Mr. Jobe (counsel) as his attorney in June 1998. On March 21, 2013, the administrative law judge awarded claimant various periods of disability benefits, including ongoing permanent total disability benefits from August 27, 2006, and medical benefits. Acting on counsel's fee petition dated February 14, 2013, the administrative law judge, on June 13, 2013, awarded counsel an attorney's fee payable by employer totaling \$16,132.50 for work performed before the Office of Administrative Law Judges (OALJ) from August 23, 2012 through March 21, 2013.

Claimant terminated his relationship with counsel effective April 14, 2014, and thereafter, representing himself, entered into a Section 8(i) settlement with employer, 33 U.S.C. §908(i), which was approved by the district director on May 8, 2014.<sup>1</sup> Counsel, on May 21, 2014, filed with the district director a fee petition under Section 28(c) of the Act, 33 U.S.C. §928(c), which included a request for \$11,940 in "uncompensated" work performed between August 24, 2004 and January 17, 2006, when the case was before the OALJ. The district director ultimately issued an order awarding counsel an attorney's fee totaling \$1,365 for work before his office, payable by claimant as a lien against his compensation, 33 U.S.C. §928(c). The district director denied all fees relating to work performed by counsel before the OALJ.

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<sup>1</sup>Pursuant to the settlement, employer agreed to pay claimant a lump sum of \$625,000 to discharge its liability under the Act. The agreement also recognized that counsel would file a fee petition with the district director for services he performed on claimant's behalf in 2013 and 2014, but it stated that employer would not be responsible for those fees.

Relevant to the current appeal, the Board affirmed the district director's disallowance of a fee for work before the OALJ, but informed counsel that he "may file an itemized petition with the administrative law judge for consideration of an award of attorney's fees as a lien against claimant's compensation pursuant to Section 28(c)." *Bessard v. C & D Prod. Specialist Co., Inc.* [*Bessard I*], BRB No. 15-0071 (Aug. 25, 2015) (unpub.), *aff'd on recon. en banc* (Dec. 15, 2015), slip op. at 3.

Counsel, on January 13, 2016, submitted to the administrative law judge a request for an attorney's fee, pursuant to Section 28(c), totaling \$11,100, representing 37 hours of attorney services performed between 2004 and 2006 at an hourly rate of \$300. Despite acknowledging the untimely nature of counsel's fee application, the administrative law judge awarded counsel a fee totaling \$5,385, payable under Section 28(c), as a lien upon claimant's compensation. He subsequently denied claimant's motion for reconsideration. Adjudicating claimant's pro se appeal, the Board vacated the administrative law judge's award of an attorney's fee and remanded the case for him to reconsider the timeliness of counsel's fee petition. *Bessard v. C & D Prod. Specialist Co., Inc.* [*Bessard II*], BRB No. 16-0548 (May 10, 2017).

On remand, the administrative law judge concluded that counsel's January 2016 fee petition was "wholly untimely" and "unconscionably late," because it was filed ten years after the services were provided and over two years after the Supplemental Decision and Order Awarding Attorney's Fees was issued in June 2013. He thus denied counsel's January 11, 2016 fee petition in its entirety and also denied counsel's motion for reconsideration.

On appeal, counsel challenges the denial of his January 13, 2016 application for an attorney's fee as untimely. Counsel contends that the Act provides no support for the administrative law judge's decision and urges the Board to remand this case for consideration of his entitlement to a fee for all work performed at the OALJ level.<sup>2</sup> Counsel notes that the Board, in granting him permission to file a fee application with the

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<sup>2</sup>Counsel cites *Muse v. Avondale Industries, Inc.*, BRB Nos. 98-1565/A (Aug. 18, 1999), in support of his request that the case be remanded because, as the Board stated in that case, the administrative law judge was the only entity who could award fees for the time in question. Counsel's citation to *Muse* is misplaced because the case did not involve the timeliness of a fee petition. Rather, it involved the administrative law judge's rejection of time for requested hours he mistakenly believed did not occur at the OALJ level. The Board vacated the denial of this time and remanded the case to the administrative law judge for further consideration because the OALJ is the only entity with the authority to award a fee for services performed before it.

administrative law judge in its December 15, 2015 order, did not set a deadline. He thus contends his fee petition was timely, as it was filed with the administrative law judge within 30 days of the Board's order, i.e., on January 13, 2016. Additionally, counsel notes that the administrative law judge did not expressly set a time limit for filing a fee petition in his 2013 decision.

Counsel is correct that the Board, in its December 15, 2015 Order on Reconsideration, informed him that he could file a fee petition with the administrative law judge for the OALJ work denied by the district director.<sup>3</sup> The Board's order, however, did not address the timeliness of any fee petition that counsel might file. The Board's decision in *Bessard II* addressed the administrative law judge's statement that counsel's fee petition for work performed from 2004 to 2006 appears untimely and "should warrant a dismissal." The Board remanded the case for the administrative law judge "to reconsider the timeliness issue as it pertains to liability for an attorney's fee," including "counsel's apparent failure to seek a fee for those services, payable by employer, at the time he filed his fee petition with the OALJ in 2013." *Bessard II*, slip op. at 4. Thus, consistent with its earlier order, the Board left it to the administrative law judge to determine the timeliness of counsel's January 2016 petition seeking attorney's fees for work performed before the OALJ from 2004 to 2006. We therefore reject counsel's contention that the Board's December 15, 2015 order granting him permission to file a fee application with the administrative law judge demonstrates that he timely filed the January 13, 2016 fee petition.

Counsel is also correct that neither the Act nor the regulations specifies a time period for filing a fee petition for work before the OALJ, 33 U.S.C. §928; 20 C.F.R. §702.132; see *Harmon v. Sea-Land Serv., Inc.*, 31 BRBS 45 (1997), and that in this case, no deadline was imposed.<sup>4</sup> Counsel, however, has not shown that the administrative law judge abused his discretion in finding, based on the facts of this case, that counsel's January 13, 2016 fee petition was untimely. See, e.g., *Conoco, Inc.*, 194 F.3d 684, 33 BRBS 187(CRT).

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<sup>3</sup>The Board's instruction was in response to counsel's contention, in his petition for reconsideration, "that the Board's decision [affirming the district director's May 19, 2014 denial of fees for work performed before the OALJ] deprives him of the right to seek an additional fee for work before the OALJ." *Bessard I*, slip op. at 3 (Dec. 15, 2015).

<sup>4</sup>Section 702.132(a), 20 C.F.R. §702.132(a), provides that a fee application shall be filed within the time frame specified by the administrative law judge. The administrative law judge stated he did not impose a deadline for counsel to submit his fee petition in his March 21, 2013 decision, because counsel had already filed his fee petition on February 14, 2013, prior to the issuance of that decision.

The administrative law judge stated that once he issued his March 21, 2013 decision awarding benefits, there existed an award of compensation in claimant's favor, which should have prompted counsel, if practicing "the appropriate route" under the Act's attorney's fee provisions, to file a fee petition for all work done before the OALJ through the date of that decision.<sup>5</sup> Supplemental Decision and Order Denying Counsel's Motion for Reconsideration at 8, 9-12. The administrative law judge found that this necessarily should have included a fee petition for counsel's work before the OALJ between 2004 to 2006, and not just for the last OALJ referral, i.e., from August 23, 2012 through the March 21, 2013. *Id.* The administrative law judge found that the district director's correspondence dated July 25, 2013, May 29, and November 4, 2014, and the Board's decision dated August 25, 2015, stating, among other things, that the district director did not have the authority to award fees for time spent before the OALJ, provided further compelling indicia of counsel's need to file a fee petition with the OALJ for the work in question.<sup>6</sup> *Id.* at 11. The administrative law judge found that counsel, however, through his own actions unnecessarily delayed such a filing by almost three years after the March 21, 2013 Decision and Order awarding benefits. *Id.*

In reaching this conclusion, the administrative law judge adequately addressed and rejected counsel's various contentions as to why he believed his January 13, 2016 fee petition was timely, and counsel has not established that the administrative law judge abused his discretion in this matter. *See generally Bankes v. Director, OWCP*, 765 F.2d 81 (6th Cir. 1985) (no abuse of discretion in denying fee where petition filed 14 months after the deadline); *Harmon*, 31 BRBS 45 (no abuse in not addressing employer's untimely objections); *Hudson v. Ingalls Shipbuilding, Inc.*, 28 BRBS 334 (1994) (no abuse in disallowing improperly itemized entries and in not permitting counsel to file an amended fee petition). Therefore, we affirm the finding that counsel's January 2016 fee petition,

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<sup>5</sup>We also reject counsel's contention that the administrative law judge improperly applied the doctrines of collateral estoppel, res judicata and laches to find his fee petition untimely. The administrative law judge did not, nor was he required to, base his decision on any particular doctrine.

<sup>6</sup>It is a well-established principle that fees for work at each level of the proceedings must be approved by the body before which the work was performed. *See generally Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 594 F.2d 986, 9 BRBS 1089 (4th Cir. 1979).

seeking fees for services rendered from August 26, 2004 to January 21, 2006, was untimely filed and the consequent denial of counsel's fee petition.<sup>7</sup>

Accordingly, we affirm the administrative law judge's Supplemental Decision and Order Denying Attorney's Fees and the Supplemental Decision and Order Denying Counsel's Motion for Reconsideration.

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

GREG J. BUZZARD  
Administrative Appeals Judge

JONATHAN ROLFE  
Administrative Appeals Judge

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<sup>7</sup>In light of this, we need not address counsel's contention that he is entitled to a delay enhancement on the requested fees.